No. 95-244

In The

Supreme Court of the United States

October Term, 1995

CHUCK QUACKENBUSH, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, IN HIS CAPACITY AS LIQUIDATOR AND TRUSTEE OF THE MISSION INSURANCE COMPANY TRUST, MISSION NATIONAL INSURANCE COMPANY TRUST, ENTERPRISE INSURANCE COMPANY TRUST, HOLLAND-AMERICA INSURANCE COMPANY TRUST AND MISSION REINSURANCE CORPORATION TRUST,

Petitioner,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, THE AMERICAN INSURANCE ASSOCIATION, THE AMERICAN COUNCIL OF LIFE INSURANCE, THE HEALTH INSURANCE ASSOCIATION OF AMERICA AND THE ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT, ALLSTATE INSURANCE COMPANY

CHARLES PLATTO
(Counsel of Record)
DIANE RUNYAN BECH
ERIC D. JONES
BROOKS MCNALLY WHITTINGTON PLATTO & VITT
8 Beaver Meadow Road
Norwich, VT 05055
(802) 649-1200
and

SALANS HERTZFELD & HEILBRONN
750 Lexington Avenue
New York, NY 10022
(212) 644-0800
Attorneys for *Amici Curiae*

(additional counsel listed on inside cover)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

Of Counsel:

ERIC LOEWE
NATIONAL ASSOCIATION OF
INDEPENDENT INSURERS
2600 River Road
Des Plaines, IL 60018
(708) 297-7800

JAMES KIMBLE
AMERICAN INSURANCE
ASSOCIATION
1130 Connecticut Ave.,
N.W.
Washington, D.C. 20036
(202) 828-7100

PHILLIP STANO
AMERICAN COUNCIL OF
LIFE INSURANCE
1001 Pennsylvania Ave.,
N.W.
Washington, D.C.
20004-2599
(202) 624-2183

DEBRA COHN
HEALTH INSURANCE
ASSOCIATION
OF AMERICA
555 13th Street, N.W.
Washington, D.C.
20004-1109
(202) 824-1679

JEFFREY J. FULLER
ASSOCIATION OF CALIFORNIA
INSURANCE COMPANIES
1121 L Street
Sacramento, CA 95814
(916) 440-1106

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

BOOKS AND ARTICLES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

STATEMENT OF INTEREST

The National Association of Independent Insurers ("NAII"), the American Insurance Association ("AIA"), the American Council of Life Insurance ("ACLI"), the Health Insurance Association of America ("HIAA"), and the Association of California Insurance Companies ("ACIC") are non-profit national and state trade organizations representing insurance companies in every state and jurisdiction of the United States.[1] The companies they represent write the vast majority of property, casualty, health and life insurance in the United States. The *amici* have a vital interest in the fundamental issue raised by this action, namely, the right to litigate in federal court claims arising out of the contractual agreements between solvent insurers, which include the great majority of insurers throughout the country, and the tiny minority of insurers that are in liquidation and are represented in disputes by state insurance commissioners who seek to limit their obligations.

Because of the nature of the services they provide, the type of risks they assume, the potential for injuries, loss, disputes and controversy, and the vast array of contractual arrangements between policy holders, insurers and reinsurers, insurance companies and the insurance industry, either on behalf of their policy

---

[1] The parties' written consent to the filing of this brief is on file with the Clerk. Respondent Allstate Insurance Company is a member of NAII and ACIC. Allstate Life Insurance Company, which is wholly owned by Respondent, is a member of ACLI.

holders or on their own behalf, are predominant participants in and users of the civil court systems of the United States – both federal and state.

Free access to the courts of the states *and*, where appropriate, the federal courts, is a fundamental right of all citizens, but is of particular importance to the insurance industry, which must by virtue of its very purpose and existence make use of and be subject to the benefits, burdens and protections of the court system.

SUMMARY OF ARGUMENT

The insurance industry participates in a wide variety of state court proceedings involving private parties and, indeed, state regulators, which involve the ongoing activities and business of insurers. In such proceedings, the state courts may indeed be well equipped to address matters of state insurance regulation. However, where the commissioner as liquidator is doing no more than attempting to enforce, or in this case avoid, contractual obligations of a failed insurer that is no longer in business, state insurance regulation is not the paramount issue. Insurers from other states should be permitted to exercise their statutory right to seek the protection of a federal forum on the basis of diversity of citizenship for the resolution of such disputes.

The inherent fallacy in the submission of the Commissioner and his *amici*, who represent regulators and legislators from other states, is that they have characterized the matters at issue in this case as part of an inseparable and seamless insurance regulatory scheme

that only a "specialized" state court can resolve, and have depicted the Commissioner as an independent neutral regulator whose sole function is to represent the public interest.[2] The Commissioner and his *amici* have, moreover, invoked the principles of the McCarran-Ferguson Act[3] to suggest that these issues are within the exclusive state regulatory *and* adjudicatory responsibility.

However, this is not a case where the matters at issue call for denial of access to the federal courts. This action is an attempt to collect money under a contract and is not an inseparable part of a regulatory scheme. No "specialized" state court exists that is uniquely equipped to determine this matter. The Commissioner is not acting as an independent neutral regulator, but as an adversary whose sole function is to collect money on behalf of the insolvent insurance company. This case can and should accordingly be resolved in the federal forum our system guarantees.

The parties and other *amici* have addressed at length the legal issues of appealability and abstention, as well as the nature of the reinsurance contracts, set off claims, and arbitration matters at issue here. The purpose of this brief, submitted on behalf of the insurance industry, is to

---

[2] *See* Brief of the Petitioner (the"Commissioner's Brief") at 3-8; Brief of Massachusetts and the Director of Insurance of the State of Missouri as *Amici Curiae* in support of Petitioner, Chuck Quackenbush, Insurance Commissioner of the State of California ("Massachusetts/Missouri Brief") at 12-13; Brief of the Council of State Governments et al., as *Amici Curiae* in support of the Petitioner at 21-22.

[3] 15 U.S.C. §§ 1011-1015.

address two fundamental issues relevant to these proceedings and to the industry: (1) the nature of liquidation and the role of the commissioner, *and* (2) the importance of diversity jurisdiction to insurers.

The history, mechanics, and general nature of liquidation proceedings demonstrate that the debt collection function of liquidation does not involve or require a complex regulatory scheme.

> The complex regulations relating to insolvent insurance companies have to do with plans of rehabilitation and payment to policy holders. Simple contract and tort actions that happen to involve an insolvent company are not matters of important state regulating concerns or complex state interests.

Grode v. Mutual Fire, Marine and Inland Insurance Co.[4] Although insolvency statutes permit a commissioner to collect debts owed to an insolvent company, they do not regulate the details or procedures of collection. The statutes do not establish specialized courts. Moreover, in collecting debts as a liquidator, the Commissioner's role is no different from that of a common law receiver or private litigant involved in a contractual dispute, and he should not possess a unique power to require that all claims proceed only in state court. To the contrary, the aura of authority of his office and the general deference that state courts are accustomed to affording the Commissioner underscore the appropriateness of exercising diversity jurisdiction in this case.

[4] 8 F.3d 953, 959 (3d Cir. 1993).

Congress established diversity jurisdiction to protect out-of-state litigants from having to litigate against citizens of another state in that state's own courts. The checks and balances of a federal forum are particularly necessary when insurers are challenged by a state regulator seeking to enforce and avoid private contractual obligations. The McCarran-Ferguson Act does not dictate a contrary conclusion. The Act relates to the *regulation* of insurance. It does not restrict the *jurisdiction* of the federal courts. As discussed below, this Court's recent decision in *United States Department of Treasury v. Fabe*[5] is significant. *Fabe* confirms that significant aspects of liquidation *are not* the business of insurance and it does not in any way suggest that federal court diversity jurisdiction is precluded.

[5] 113 S. Ct. 2202 (1993).

ARGUMENT

I. THE HISTORY, MECHANICS AND OPERATION OF INSURANCE COMPANY INSOLVENCY AND LIQUIDATION AND THE ROLE OF THE COMMISSIONER DEMONSTRATE THAT STATE COURT JURISDICTION IS NOT REQUIRED.

A. The History of Insurance Company Insolvency and Liquidation and the Commissioner's Role as Receiver Show that the Debt Collection Aspect of Liquidation does not Involve a Complex Regulatory Scheme.

For a significant period in the early history of insurance regulation, neither the states nor the federal government enacted statutes that defined the insolvency process, and liquidation was governed by traditional equity receiverships.[6] The historical antecedent for the modern liquidator is, therefore, the common law receiver. While insurance insolvency proceedings eventually became statutory, the basic principle that the liquidator acts as a receiver has remained virtually unchanged.

The states did not develop substantial statutes governing insurance insolvency until the mid-twentieth century. Although the process became statutory in some states as early as the mid-1800's, it has been stated that "[n]one of this legislation . . . amounted to systematic and comprehensive treatment of the subject."[7] Even those

---

[6] Spencer Kimball, *History and Development of the Law of State Insurance Insolvency Proceedings: An Overview, in* Law and Practice of Insurance Company Insolvency 9, 12 (American Bar Ass'n 1986) (hereinafter "Kimball").

[7] *Id.* at 10.

states that enacted broad statutes failed to provide any details to govern the process.[8] For example, a New York statute enacted in 1851 merely provided that if it appeared that an insurance company's assets were deficient, the state comptroller could apply to a court for a decree dissolving the company and distributing its assets.[9]

Beginning in 1932, state statutes governing insurance company insolvency became more sophisticated. Leading states such as New York revised their insolvency statutes,[10] and in 1939 the National Conference of Commissioners on Uniform State Laws and the American Bar Association approved the Uniform Insurers Liquidation Act. ("Uniform Act").[11] These statutes typically included new provisions that governed priorities for distributing assets, established grounds and procedures for setting aside fraudulent or preferential transfers, defined procedures for filing claims against the estate, and addressed

---

[8] *Id.* In their brief *amici curiae*, Massachusetts and the Missouri Director of Insurance maintain that insolvency regulation had become detailed and complex by 1851. Massachusetts/Missouri Brief at 9-10. The authority they cite for this proposition, however, indicates that these statutes hardly constituted significant regulation or a comprehensive and complex scheme. *See* Kimball, *supra* note 6 at 1-10.

[9] Kimball, *supra* note 6 at 9 (citing Laws of 1851, ch. 95, § 6, contained in Denio's & Tracy's Revised Statutes of the State of New York I:1288, § 30 (1852)).

[10] *Id.* at 11; *see also* 4 Adelbert G. Straub, Jr., *Examination of Insurance Companies* 409-16 (1954).

[11] 13 Uniform Laws Annotated 321-53 (Master ed. 1986 & Supp. 1988).

reciprocity among the states to allow for efficient interstate coordination of insolvency proceedings.[12] Significantly, these improvements did not define procedures for claims made by the estate against third parties, except to confer power upon the liquidator to pursue such claims in court.

The next significant development in insurance insolvency legislation began in the mid-1960's when Wisconsin re-examined the state of insolvency laws and enacted the first modern comprehensive insolvency statute. The innovations of the Wisconsin statute included broad and flexible summary procedures, greater details to govern the management of a troubled company in rehabilitation, and a change in the priorities of asset distribution that departed from the traditional priority schemes.[13] Inspired by the Wisconsin statute, the National Association of Insurance Commissioners ("NAIC")[14] revisited insurance company liquidation and in 1977 approved the NAIC Model Supervision, Rehabilitation, and Liquidation Act, ("NAIC Model Act"),[15] which was based largely upon the Wisconsin statute.

Significantly, these modern statutes again did not provide detailed provisions regarding claims brought on behalf of a liquidated entity. Debt collection had not been viewed as a function that required detailed regulation

---

[12] Kimball, *supra* note 6 at 20-21; *see generally* Uniform Act.

[13] Wisc. Stat. Ann. ch. 645 (West 1995).

[14] The NAIC is a voluntary association of the insurance commissioners of the several states.

[15] Although the NAIC has revised some provisions of the Model Act, most states have adopted the 1977 version.

and it was not a focus of the broad reexamination of liquidation laws undertaken by the Wisconsin legislature or the NAIC. Rather, the goals of the reexamination were to encourage prompt action by commissioners against troubled insurers and to revise the priorities and procedures governing distribution of assets.[16]

Today, most states have codes based upon either the Uniform Act or the NAIC Model Act. These statutes confirm that, for debt collection purposes, the commissioner merely steps into the shoes of the insolvent insurer. Notably, the statutes contain almost no provisions governing the details that restrict or guide a liquidator's pursuit of debt collection actions on behalf of the liquidated company. For example, the Uniform Act, which has been adopted by California,[17] consists of twelve provisions, only eight of which relate to the liquidation of a domiciliary insurer.[18] Of these eight, only one addresses the collection of debt, and it merely provides that the Commissioner shall be vested with title to "rights of action" of the insurer.[19] The NAIC Model Act is similarly devoid of comprehensive sections that govern debt collection. Although the Model Act contains more liquidation provisions than the Uniform Act, only four

---

[16] Wisc. Stat. Ann. ch. 645, Preliminary Comment; Kimball, *supra* note 6 at 15-26, 40-41.

[17] Cal. Ins. Code §§ 1064.1 - 1064.12.

[18] *Id.* §§ 1064.1-1064.2, 1064.4, and 1064.6-1064.10; Uniform Act §§ 1, 2, 4, and 6-10.

[19] Uniform Act, § 2(2); Cal. Ins. Code § 1064.2(b). The Uniform Act also contains two provisions governing the collection of debts owed to out-of-state insurers. Uniform Act §§ 3(2), 10; Cal. Ins. Code §§ 1064.3(b), 1064.10.

address the powers and procedures of a commissioner to collect debt.[20] Again, these provisions simply confer upon the commissioner the power to initiate actions against third parties; they do not provide substantive or procedural details or enhance the power of the commissioner to pursue such actions. Most importantly, no provision mandates that a debt collection action on behalf of the estate be litigated in a particular court.

From this history, two important principles emerge. First, the modern liquidator, now almost universally the insurance commissioner under current statutes, is akin to the common law receiver when acting to collect debts on behalf of the insolvent insurer. For this reason, his role and powers are those of a receiver, and not those of a public official charged with public duties.[21] Second, the development of modern statutes governing insurer insolvencies has not reformed the provisions that allow the commissioner to bring claims against third parties. To the contrary, the additional provisions merely govern priorities of distribution, voidable transfers, procedures for making claims against the estate, and reciprocity among the states. The pursuit of claims by a liquidator against third parties has simply not become a part of a complex web of detailed provisions, but has been largely left to the common law of receivership.

---

[20] Model Act §§ 24, 27, 34, 37.

[21] *See, e.g., Texas Commerce Bank-El Paso v. Garamendi*, 28 Cal. App. 4th 1234, 1245, 34 Cal. Rptr. 2d 155, 162 (Cal. App. 2 Dist. 1994); *Corcoran v. National Union Fire Ins. Co.*, 143 A.D.2d 309, 310-311, 532 N.Y.S.2d 376, 378 (App. Div. 1st Dep't 1988); NAIC *Receivers Handbook for Insurance Company Insolvencies* 9-6 (1992).

B. Liquidations are not Subject to Detailed Regulation under the Insolvency Statutes.

The basic procedural operation of insurer insolvency statutes is essentially the same in almost every state. The proceedings commence when the particular state's insurance commissioner concludes that an insurer appears financially impaired and initiates a delinquency action in a state court of general jurisdiction.[22] At this stage in the proceedings, the commissioner seeks a finding by the court that one of the grounds for delinquency, *e.g.*, "insolvency" of the insurer, exists. If such a finding is supported, the insurer is placed in rehabilitation or liquidation.[23]

A rehabilitation (or "conservation") order typically provides that the commissioner shall take immediate possession of the insurer's property, conduct the insurer's business, and take whatever steps are appropriate and necessary to remove the causes and conditions that gave rise to the delinquency proceedings.[24] If the rehabilitation is successful, the rehabilitation order may be dissolved;

---

[22] Davis J. Howard, *Uncle Sam Versus the Insurance Commissioner: A Multi Level Approach to Defining the "Business of Insurance" Under the McCarran-Ferguson Act*, 25 Willamette L. Rev. 1 (1989) (hereinafter "Howard"); Cal. Ins. Code § 1011; NAIC Model Act § 11. *See generally* Jack W. Traylor, *The Liquidation Process, in* Law and Practice of Insurance Company Insolvency 63 (American Bar Ass'n 1986).

[23] *Id.*; *see also* Cal. Ins. Code § 1016; NAIC Model Act §§ 16-23.

[24] Cal. Ins. Code § 1011; Wolcott B. Dunham, Jr., 2 New York Insurance Law, § 16.04(2)(a) (1995) (hereinafter "Dunham"); NAIC Model Act § 17.

otherwise, the commissioner may seek a liquidation order.

Liquidation constitutes corporate death. The company ceases to conduct the business of insurance, policies are cancelled, and the commissioner winds up the company's affairs.[25] Upon entry of the liquidation order, the commissioner is appointed liquidator and becomes a private trustee for the liquidated company's estate. The primary function of the commissioner under a liquidation order is to collect the insurer's assets to distribute them among creditors according to the priority statute and to wind up the company's affairs.[26]

Typically, the liquidation order provides that all policies are deemed cancelled as of a particular date, that all actions against the insurer shall be stayed, that the insurer will cease defending cases on behalf of insureds, and that all policyholders, claimants, beneficiaries and general creditors shall be provided with notice of the liquidation and a proof of claim form for submission to the liquidator.[27] Upon entry of a liquidation order, the commissioner is vested immediately with title to all of the insurer's property, including contracts and causes of action.[28] While the commissioner as liquidator may initiate proceedings to collect debts under any such contracts, he acts as a private trustee for the insolvent company's

---

[25] Dunham, *supra* note 22 § 16.04(3); Kimball, *supra* note 6 at 29-38.

[26] Cal. Ins. Code § 1057; *Texas Commerce Bank*, 28 Cal. App. 4th at 1244, 34 Cal. Rptr. 2d at 161.

[27] Howard, *supra* note 20; Cal. Ins. Code § 1016.

[28] Cal. Ins. Code §§ 1011, 1064.2(b).

estate[29] and may enforce the contracts only subject to any rights and defenses that may have been asserted against the insolvent insurer.[30]

Once the liquidator has marshalled the estate's assets, his remaining task is to distribute them among creditors according to state priority statutes. Generally, top priority is given to administrative expenses. Next is the usually modest payment of salaries to the insurer's employees. Policyholders, third party claimants and beneficiaries receive the next priority, followed by general creditors and all other claimants.[31]

Notable in the operation and mechanics of insolvency statutes is that liquidation is not subject to significant regulation. *Amici* do not suggest that contested contract claims are insignificant in terms of the value that such claims may have as estate assets. Rather, enforcing contractual rights is simply left to the adversary process

---

[29] Cal. Ins. Code § 1057, *Texas Commerce Bank*, 28 Cal. App. 4th at 1244, 34 Cal. Rptr. 2d at 161.

[30] *Prudential Reinsurance Co. v. Superior Court (Garamendi)*, 3 Cal. 4th 1118, 1125, 842 P.2d 48, 52, 14 Cal. Rptr. 2d 749, 753 (Cal. 1992); Cal. Ins. Code §§ 1011, 1037(b) and (f), 1064.2(b).

[31] Policyholders' recovery is not limited to estate assets, but may also be satisfied from state insurance guaranty association funds. *See, e.g.*, Cal. Ins. Code §§ 1063-1063.15; *see generally* Michael P. Duncan, *The NAIC Model Property and Casualty Post Assessment Guaranty Funds, in* Law and Practice of Insurance Company Insolvency 459 (American Bar Ass'n 1986). All states have property and casualty guaranty association funds. The Mission Group of Insurance Companies was licensed in all fifty states, and thus, each state's fund was triggered by its insolvency. Insurers are the providers of guaranty association funds.

that governs typical commercial disputes between private citizens.

C. The Nature of Debt Collection in Liquidation and the Commissioner's Role Create a Need for Diversity Jurisdiction.

In most aspects of insurance regulation (*i.e.*, licensing insurers, setting rates, imposing assessments, and regulating agents and brokers), the commissioner acts as a state official charged with a public duty. The commissioner's role as a liquidator, however, is legally akin to that of a private citizen acting on behalf of a private entity. Upon entry of the liquidation order, the commissioner steps into the shoes of the liquidated entity and does not act as a state official.[32] His duties are to the estate of the liquidated company, not to the public at large.[33]

The fact that the commissioner's role changes when he becomes a liquidator is significant to the issues presented in this case. First, the commissioner as a liquidator is little more than a debt collection agent. Consequently,

---

[32] *Prudential Reinsurance*, 3 Cal. 4th at 1137, 842 P.2d at 59, 14 Cal. Rptr. 2d at 760, (commissioner, when acting as a liquidator, "steps into the shoes of the insolvent insurer"); *Texas Commerce Bank*, 28 Cal. App. 4th at 1245, 34 Cal. Rptr. 2d at 162 (unlike his usual role as public official acting on behalf of the state, the commissioner acting as receiver for a particular insolvent insurer "steps into the shoes of that insurer").

[33] *Texas Commerce Bank*, 28 Cal. App. 4th at 1244 34 Cal. Rptr. 2d at 161; *National Union*, 143 A.D.2d at 310-311, 532 N.Y.S. 2d at 378.

he cannot hide behind the assertion that he is enforcing public policy as defined in a complex regulatory scheme. The principles set forth by this Court in *Burford v. Sun Oil Co.*[34] (*"Burford"*) and *New Orleans Pub. Serv. Inc. v. New Orleans* (*"NOPSI"*),[35] therefore, do not require a federal court to abstain from hearing commercial disputes that arise in liquidation proceedings. Second, while the commissioner acts in a private capacity, he retains his purported position of authority. This purported authority is a significant advantage in litigation, undermining the right of adverse parties to advocate their rights on an even playing field. If a liquidator were able to avoid appearing in federal court, then the liquidator would receive an unfair advantage by appearing only in a court that is accustomed to affording him great deference.[36] This unfair advantage is ameliorated by the ability of insurers with adverse interests to invoke federal diversity jurisdiction.

The *amici* in support of the Commissioner contend, *inter alia*, that a state forum is necessary to permit the commissioner to marshal assets effectively, because the adverse party will enter the action "with the goal of maximizing its benefit at the expense of those interested

---

[34] 319 U.S. 315 (1943).

[35] 491 U.S. 350 (1989).

[36] *See* Ronald A. Jacks, *Arbitration and Insurer Insolvencies: The Triumph of Common Sense Over Abstract Principle, in* Law and Practice of Insurance Company Insolvency 259, 261-62 (American Bar Ass'n 1986) (discussing the "home field advantage" that state liquidators enjoy in "a friendly forum where they can expect to be treated with something more than normal deference").

in the liquidation estate."[37] This is the case in any commercial litigation. Moreover, the *amici* ignore that the commissioner himself is charged with maximizing the estate's benefits at the expense of adverse third parties. The relevant factor is that in state court, the commissioner may be given an unfair advantage through the aura of authority created by his office, despite his role as a private litigant.

The position of the liquidator as representative of private interests is underscored by the fact that the compensation of those employed to assist collecting debts is directly related to the assets collected for the estate. Under all liquidation statutes, the commissioner is given the power to hire deputies, attorneys, accountants, and any other employees that he deems necessary in the administration of the estate. The statutes further provide that the compensation of such employees and agents is to be paid from the assets of the estate.[38] Consequently, the commissioner's duty to maximize assets is greatly assisted by a considerable financial incentive on the part of his agents to aggressively pursue all claims. Indeed, Congress has recognized that the liquidations of large estates, like Mission's, generate millions of dollars in fees paid to law firms and consultants employed to collect claims. Congress expressed concern that this creates a "perception that insolvent companies are more valuable

---

[37] Massachusetts/Missouri Brief at 14.

[38] Cal. Ins. Code §§ 1035, 1036, and 1064.2(c); Model Act § 24(A)(1)-(2) and (5); Uniform Act § 2(3).

dead than alive for those with a financial stake in the process of carving up the carcass."[39]

Moreover, due to the nature of insolvency, the pursuit of causes of action need not be adjudicated in one forum. This principle is demonstrated first and foremost by the absence of any provisions in the insolvency statutes that require debt collection actions to be litigated in a single liquidation court. Despite the Commissioner's constant protests that litigation in other courts would somehow impair the liquidation and is somehow prohibited, he has failed to cite a statutory provision restricting the available courts for adjudicating such claims, and he has failed to present any showing that a federal adjudication of a commercial dispute would actually impair the liquidation proceedings.[40]

In liquidation the goal is simply to collect debts and pay claims in preparation for the inevitable dissolution of the company. As one former Special Deputy in the New York State Insurance Department Liquidation Bureau has

---

[39] House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, *Failed Promises, Insurance Company Insolvencies*, 101st Cong. 2d sess. (1990).

[40] The Missouri and Massachusetts *amici* in support of the Commissioner assert that debt collection proceedings must be handled by the liquidation court because such courts have peculiarized knowledge and they are thus better able to make an informed decision. Massachusetts/Missouri Brief at 15. These *amici*, however, fail to explain how an informed resolution of a straightforward commercial dispute, even when one of the parties is in receivership, somehow requires a special or peculiar knowledge so unique to state courts that no federal judge or insurance/reinsurance arbitration panel could decide the issues competently or without disrupting the insolvency proceeding.

stated, "In liquidation, it is over, there is a funeral, the company is buried and we go on to liquidate its assets and pay its claims."[41] The Commissioner's claim that adjudication of a contract action in a federal forum is in conflict with the mechanisms and goals of the insolvency statutes is therefore illogical and untenable.

In sum, the nature of debt collection and the role of the commissioner as liquidator do not necessitate a specialized state forum. To the contrary, these factors support the right of the insurers to seek a federal forum on the basis of diversity jurisdiction.

II. THE RIGHT OF ACCESS TO THE FEDERAL COURTS UNDER DIVERSITY JURISDICTION IS AN IMPORTANT SAFEGUARD TO INSURERS IN CONTRACT ACTIONS BROUGHT BY STATE INSURANCE COMMISSIONERS IN THEIR ROLE AS LIQUIDATOR.

Diversity jurisdiction has always been a fundamental tenet of the federal court system. The framers of the Constitution recognized that in order to ensure fairness in litigation between a local entity and an out-of-state party, free and ready access should be provided to the federal courts.[42] The First Congress agreed and promptly

---

[41] Leonard Minches, *Roadmap to Rehabilitation and Liquidation Proceedings, in* Law and Practice of Insurance Company Insolvency 93, 100 (American Bar Ass'n 1986).

[42] Some commentators have questioned whether federal diversity jurisdiction was grounded on a fear of local prejudice against out-of-state citizens or on some other reason, such as the apprehension of commercial interests in submitting themselves

created the federal courts and vested them with jurisdiction in cases "where an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state."[43] At the same time that Congress created diversity jurisdiction, it also created as part of the Judiciary Act of 1789 the right to remove cases from the state courts to the federal courts on the basis of diversity of citizenship.[44]

In an early decision, Justice Story explained the basis for diversity jurisdiction:

> The Constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might some times obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies . . . between citizens of different states . . . it enables the parties, under the authority of congress, to have the controversies heard, tried, and determined before the national tribunals.[45]

Both diversity jurisdiction and the right of an out-of-state entity to remove have remained a part of our judicial system for more than 200 years. While proposals to

---

to the hazards of state courts with elected judges and limited review of legislative acts. *See* Paul M. Bator, Paul J. Mishkin, Daniel J. Meltzer, and David L. Shapiro, *Hart and Wechsler's The Federal Courts and The Federal System* 1658-59 (3d ed. 1988).

[43] Judiciary Act of 1789, ch. 20, § 11-12, 1 Stat. 73, 78, 79.

[44] *Id.*

[45] *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816).

either limit or abolish diversity jurisdiction have been made ever since federal diversity jurisdiction was established in 1789,[46] it is well recognized that only Congress, and not the courts, is authorized to do so. Congress has not done so. Justice Frankfurter, an ardent foe of federal diversity jurisdiction, made this point in his dissent in *Burford*:

> The reasons which led Congress to grant such jurisdiction to the federal courts are familiar. It was believed that, consciously or otherwise, the courts of a state may favor their own citizens. . . . Whether it is a sound theory, whether diversity jurisdiction is necessary or desirable in order to avoid possible unfairness by state courts, state judges and juries, against outsiders . . . these are matters which are not my concern as a judge. They are the concern of those whose business it is to legislate, not mine.[47]

Consistent with the premise that only Congress may limit federal diversity jurisdiction, this Court has acknowledged that "federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred."[48] Indeed, this Court has described the federal

---

[46] *See* Victor Flango, *How Would Abolition of Federal Diversity Jurisdiction Affect State Courts?* 74 Judicature 35 n.1 (June/July 1990) (discussing the history of the debate on diversity jurisdiction).

[47] 319 U.S. 315, 337 (1943).

[48] *NOPSI, supra,* 491 U.S. at 358.

courts' obligation to adjudicate claims within their jurisdiction as "virtually unflagging."[49]

The concerns that motivated the framers of the Constitution to vest diversity jurisdiction in the federal courts exist today. Authoritative studies conducted in recent years have repeatedly documented the widespread perception held by litigants[50] and, indeed, by the judiciary,[51] that out-of-state (or commercial) defendants may be subject to bias in the state courts.

Because of their extensive involvement and participation in litigation throughout the country, insurers are

---

[49] *Id.* at 359 (citations omitted).

[50] *See, e.g.,* Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction,* 41 Am. U. L. Rev. 369, 408-09 (Winter 1992) (study reported that fifty-four percent of plaintiffs' attorneys reported bias against defendants in state court, with more than half that number ascribing such bias to defendant's out-of-state status; attorneys for insurers were most likely (fifty-nine percent) of all defense attorneys to report out-of-state bias); Victor Flango, *Attorneys' Perspectives on Choice of Forum in Diversity Cases,* 25 Akron L. Rev. 41, 105 (1991) (fear of prejudice against out-of-state residents and corporations is significant consideration in attorneys' forum choice).

[51] *See* Federal Judicial Center, *Planning for the Future: Results of a 1992 Federal Judicial Center Survey of United States Judges* 4, 26 (1994) (forty-eight percent of circuit judges and forty percent of district judges believed that state court bias was at least somewhat a problem); *see also* Charles L. Brieant, *Diversity Jurisdiction: Why Does the Bar Talk One Way But Vote the Other Way With Its Feet,* 61 N.Y. State Bar J. 20 (July 1989) (Judge Brieant states that diversity jurisdiction has met objectives of ensuring impartial administration of law and protecting out-of-state litigants from local prejudices).

particularly aware of and subject to the issues involving choice of forum and the circumstances calling for diversity jurisdiction. *Amici* do not criticize the state court system or minimize the important role it plays. Insurance companies participate in state court proceedings in a vast array of situations, including actions directly involving state regulation of insurers and actions involving the commissioner of insurance in his capacity as a neutral regulator.

It must be recognized, however, that in situations where the interests of the citizens of a state are at stake, there is a widespread perception that insurers are at a distinct disadvantage in the state court system.[52] The disadvantages or perceived disadvantages confronting insurers in state court may, moreover, be exacerbated by the growth in claims and increasing hostility against insurers.[53]

---

[52] Willy E. Rice, *Judicial Bias, The Insurance Industry And Consumer Protection: An Empirical Analysis of State Supreme Courts' Bad Faith, Breach Of Contract, Breach-Of-Covenant-Of-Good-Faith And Excess-Judgment Decisions, 1900-1991*, 41 Cath. U. L. Rev. 325, 331 (Winter 1992) (state courts "allow extra-legal factors, which have little to do with the merits of the suits, to influence the disposition of insurance-related cases"); *id.* at 369 (state courts "unintentionally allow the types of insured to influence the disposition of . . . actions").

[53] *See Insurance Industry Target in Rising Spate of Lawsuits*, Los Angeles Times, May 30, 1989 at 9 (reporting "anger in many quarters toward the [insurance] industry" stemming in part from problems experienced by businesses and municipalities in finding insurance coverage in the 1980's and from the rising cost of insurance); *See also Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 43, 46 (1991) (O'Connor, J., dissenting) (criticizing Alabama state courts for "giv[ing] civil juries complete, unfettered,

Insurance liquidations and related litigation are classic examples of the situation where an out-of-state insurer may be at a disadvantage in the state court system. This is so because (a) the commissioner is the adversary, and while he is clothed with the police power of the state, in liquidation proceedings he is not acting as a neutral regulator but as a representative of a private business, and (b) the liquidator's sole job is to maximize recoveries, and while this may be a laudable goal, it is one which could put the deep pocket out-of-state insurer at extreme disadvantage in the state court system. This is particularly true where a limited fund is available. Thus, the fundamental considerations that led to the establishment of diversity jurisdiction are especially present here.

As set forth above, an understanding of the liquidation statutes and the role of the liquidator reveals that debt-collection actions do not *require* state court involvement. In *NOPSI*, this Court held that the principles underlying *Burford* abstention are not implicated where the case "does *not* demand significant familiarity with, and will not disrupt state resolution of, distinctively local regulatory facts or policies."[54] Debt collection does not implicate these factors. This case and others like it – involving straightforward contract claims – require no greater familiarity with state law than other cases routinely handled by the federal courts and pose no threat of

---

and unchanneled discretion to determine whether . . . to impose punitive damages," thus permitting juries to "target unpopular defendants . . . and redistribute wealth.").

[54] 491 U.S. at 364.

disruption to "distinctively local regulatory facts or policies."[55]

The abstention doctrine developed by this Court has, moreover, been applied only in very narrowly defined areas and "remains the exception, not the rule."[56] The essentially automatic abstention sought by the Commissioner in all cases relating to insurer liquidations is impossible to reconcile with the exceptional nature of abstention.

Nor does the McCarran-Ferguson Act[57] affect the determination of whether abstention is proper in this case. The Act provides only that "[n]o Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance. . . . "[58] While the policy behind the Act is to leave the *regulation* of insurers to the states, the Act does not modify or even address the diversity

---

[55] *See Grode v. Mutual Fire, Marine and Inland Insurance Co.*, 8 F.3d 953, 959 (3d Cir. 1993) ("Simple contract and tort actions that happen to involve an insolvent insurance company are not matters of important state regulatory concern or complex state interests"); *cf. Bennett v. Liberty National Fire Insurance Co.*, 968 F.2d 969 (9th Cir. 1992) (reversing remand to state court and enforcing arbitration agreement because rights liquidator sought to enforce against reinsurers arose from insolvent insurer's contracts rather than Montana insolvency statute).

[56] *NOPSI*, 491 U.S. at 359 (citations and internal quotation marks omitted).

[57] 15 U.S.C. §§ 1011-1015.

[58] 15 U.S.C. § 1012(b).

jurisdiction of the federal courts in insurance cases.[59] This Court's recent decision in *United States Dep't of Treasury v. Fabe*[60] supports this conclusion. The issue in *Fabe* was whether liquidation was the "business of insurance" under the McCarran-Ferguson Act. Four justices concluded that it was not. The majority found that only certain aspects of liquidation – those designed to protect policy holders and to give them priority – constituted the "business of insurance." *Fabe* does not even remotely suggest that the mere existence of a liquidation proceeding could cut off otherwise available rights to a federal forum.

This case presents issues regarding contractual rights of arbitration and set off. No rules or regulations are implicated. These straightforward contractual issues do not necessitate a state forum.

---

[59] *Atlantic & Pacific Insurance Co. v. Combined Insurance Co.*, 312 F.2d 513, 515 (10th Cir. 1962); *Grimes v. Crown Life Insurance Co.*, 857 F.2d 699, 702 (10th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989); *see also Stamp v. Insurance Co. of North America*, 908 F.2d 1375, 1379 (7th Cir. 1990) ("[N]o state may obliterate the diversity jurisdiction of a district court by claiming exclusive authority over a subject. Federal laws preempt state laws, not the other way 'round").

[60] 113 S. Ct. 2202 (1993).

CONCLUSION

For the reasons set forth herein and in the briefs of respondent and its other supporting *amici curiae* we respectfully submit that the decision below should be affirmed.

Dated: January 5, 1996

Of Counsel:

ERIC LOEWE
NATIONAL ASSOCIATION OF INDEPENDENT INSURERS
2600 River Road
Des Plaines, IL 60018
(708) 297-7800

JAMES KIMBLE
AMERICAN INSURANCE ASSOCIATION
1130 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 828-7100

PHILLIP STANO
AMERICAN COUNCIL OF LIFE INSURANCE
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2599
(202) 624-2183

Respectfully submitted,

CHARLES PLATTO
(Counsel of Record)
DIANE RUNYAN BECH
ERIC D. JONES
BROOKS MCNALLY
WHITTINGTON PLATTO & VITT
8 Beaver Meadow Road
Norwich, VT 05055
(802) 649-1200
and
SALANS HERTZFELD & HEILBRONN
750 Lexington Avenue
New York, NY 10022
(212) 644-0800

Attorneys for *Amici Curiae*

(additional council listed on next page)

DEBRA COHN
HEALTH INSURANCE ASSOCIATION OF AMERICA
555 13th Street, N.W., 600 East
Washington, D.C. 20004-1109
(202) 824-1679

JEFFREY J. FULLER
ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES
1121 L Street
Sacramento, CA 95814
(916) 440-1106